IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

FAO (MVA) No. 271 of 1995.

Date of Decision: August 23, 2006.

National Insurance Co. …Appellant.

Versus

Chameli Devi and others. ….Respondents.

Coram

The Hon'ble Mr. Justice V.K.Gupta, C.J.

Whether approved for reporting[1]?

For the appellant: Mr. Anup Rattan, Advocate.

For respondents 1 to 3: Mr. B.S.Kanwar, Advocate.

For respondents 4 and 5. Mr. Bimal Gupta, Advocate.

V.K.Gupta, C.J. (Oral)

The only ground upon which this appeal assailing the judgment of the Claims Tribunal has been filed by the insurer is that Rakesh Kumar, respondent No. 4 herein who was driving the scooter at the time of the accident, was not possessed of a valid driving licence.

The following issues were framed by the Tribunal for adjudication in this case:

1. Whether deceased Mam Raj died in an accident involving scooter bearing registration No. HIN 278, being driven rashly and negligently by respondent No. 1? OPP.

Whether the reporters of Local Papers are allowed to see the Judgment?

2. If issue No. 1 is proved in affirmative, to what amount of compensation and from whom the petitioners are entitled to receive? OPP.

3. Whether the driver of the scooter was not having a valid driving licence, if so, its effect? OPR-3.

4. Relief.

Finding on issue No. 3 is as under:

> "33. The respondent No. 1 was having a licence with him, but the case of the respondent No. 3 is that the said driving licence was fictitious. To prove this allegation they examined one Kirpal Datt Joshi, Licence Dealing Clerk, R.T.O., Dehradun. He testified that there was no such licence issued on the parentage or identity similar to respondent No. 1. But this is not the clinching evidence on this plea.
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> 34.RW-5 set the controversy at rest by deposing that SDM is also empowered to issue motor vehicle licenses and in that case the entries of the licenses issued by him will not be incorporated in this register he was asked to produce. Though in the end, he stated that he did not know whether SDM Dehradun was empowered like-wise or not. But this does not mean that the said officer was not empowered to issue driving licenses. The respondent No. 3 cannot be said to have proved convincingly that SDM Dehradun did not issue such like driving licenses. The element of factitious issuance of the

> **licence in possession of respondent No. 1 cannot be inferred from his evidence nor can it be said that respondent No. 1 was not in possession of a valid driving licence. The remaining evidence of the respondent is of no consequence and does not require to be referred to here.**
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> **35. Accordingly, this issue is decided against respondent No. 3."**

Two points arise for consideration in this case. First, RW-5 undoubtedly did create an ambiguity in his statement when he deposed that the driving licence in question could have been issued by the S.D.M. also. Whether the driving licence in question was actually issued by the S.D.M. or it was issued by the R.T.O., Dehradun was a fact which ought to have been conclusively proved. In the face of the aforesaid ambiguity, it was the duty of the appellant – insurer to have put questions in re-examination to the aforesaid witness to elicit from him as to who had actually issued the driving licence in question. Because of this ambiguity, a doubt may have arisen about the genuineness of the driving licence, but it can also be said that because of the ambiguity itself, a doubt had also arisen whether the driving licence was genuine or it was not genuine. Since the onus to prove the issue lay upon the appellant insurer, the learned Tribunal was right in holding

that the appellant had not discharged the onus properly.

The second point which arises for consideration is that the owner of the vehicle involved in the accident, namely Mohan Lal, in his testimony clearly deposed that he had left the vehicle on 16.5.1993 with a mechanic as the vehicle had developed a snag while he was driving it from Nahan to Yamunanagar and apparently while the vehicle was lying with the mechanic, Rakesh Kumar, respondent No. 4 unauthorisedly took it, in any event without his consent and knowledge. To the same effect is the statement of respondent Rakesh Kumar also who appeared as RW-2 in the Tribunal. He has clearly stated that on 10.5.1993, respondent Mohan Lal had kept the vehicle with the mechanic Pawan Kumar and that on 17.5.1993, mechanic Pawan Kumar had told him to drive the vehicle for test driving etc. and it was at that stage that the accident occurred.

In the case of *National Insurance Co. Ltd.* vs. *Swaran Singh and others,* AIR 2004 Supreme Court 1531, their Lordships of the Supreme Court have observed as under:

> **"In Skandia's case (supra), this Court held:**
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> > **" Section 96(2) (b) (ii) extends immunity to the insurance company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not duly**

licensed, or by any person who has been disqualified from holding or obtaining driving licence during the period of disqualification. The expression "breach", is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation" (See Collins English Dictionary). It is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of the promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be willful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect, how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the vehicle in charge of a person who dies not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach, the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive it himself, it cannot be said that the insured is guilty of any breach."

The aforesaid ratio is clearly applicable to the facts of this case, because in the present case,

the appellant insurer has not established that the insured Mohan Lal was guilty of an infringement or violation of the promise that a person who is duly licensed alone would be incharge of the vehicle. Undoubtedly Mohan Lal had not permitted Rakesh Kumar to drive the vehicle because Rakesh Kumar drove the vehicle without the knowledge and consent of Mohan Lal.

There is no merit in this appeal.

Dismissed.

Whatever amount is lying in deposit in this Court shall be made over in favour of the claimants in accordance with the award.

August 23, 2006. **(V.K.Gupta),**
(PC). **Chief Justice.**